

No. PD-0553-20
In the
Texas Court of Criminal Appeals
At Austin

FILED
COURT OF CRIMINAL APPEALS
11/23/2020
DEANA WILLIAMSON, CLERK

—◆—
No. 01-18-00897-CR
In the
Court of Appeals for the
First District of Texas
At Houston

—◆—
No. 1532340
In the 178th District Court
Of Harris County, Texas

—◆—
JAMAILE JOHNSON
Appellant
V.
THE STATE OF TEXAS
Appellee

—◆—
**STATE'S RESPONSE TO APPELLANT'S MOTION FOR BAIL
PENDING APPEAL**
—◆—

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through the undersigned assistant district attorney, and files this response to appellant's motion for bail pending appeal. In support thereof, the State respectfully submits the following:

On May 28, 2020, a panel of the First Court of Appeals issued a majority opinion that reversed the trial court's judgment and remanded the case for a new trial. On October 21, 2020, this Court granted the State's petition for discretionary

review and the case is currently pending before this Court. Appellant subsequently filed a motion for bail pending appeal pursuant to Texas Code of Criminal Procedure Article 44.04(h). The State requests that bond be set at \$75,000, the same amount that was imposed by the trial court before appellant was convicted. (See Exhibits A, B)

The criteria for determining a reasonable bail include: (1) the nature of the offense; (2) appellant's ability to make bail; (3) his prior criminal record; (4) his conformity with previous bond conditions; (5) his employment record; (6) his family ties to the community; and (7) appellant's length of residence in the community. *Montalvo v. State*, 786 S.W.2d 710, 711 (Tex. Crim. App. 1989); *see also* Tex. Code Crim. Proc. art. 17.15.

Consideration of each of these factors is not required, nor is the list exhaustive. *Montalvo*, 786 S.W.2d at 711; *see Ex parte Rubac*, 611 S.W.2d 848, 849 (Tex. Crim. App. [Panel Op.] 1981) (primary factors to consider in determining reasonable bail are the length of the sentence and the nature of the offense); *Aviles v. State*, 26 S.W.3d 696, 699 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (primary factors to consider include the fact that the conviction has been overturned; the State's ability, if any, to retry the appellant; and the likelihood that the decision of the court of appeals will be overturned).

Appellant asserts that, because he is indigent, the only reasonable bond would be a personal bond. However, while the ability to make bail is a factor to be considered, ability alone, even indigency, does not control the amount of bail. *See* Tex. Code Crim. Proc. art. 17.15; *Ex parte Charlesworth*, 600 S.W.2d 316, 317 (Tex. Crim. App. [Panel Op.] 1980).

Appellant has not addressed the nature or circumstances of the offense. This offense involves the theft of a truck with several aggravating factors: (1) appellant had a screwdriver with him when he got into the truck; (2) the complainant was sitting in the truck when appellant got into the driver seat; (3) appellant moved the truck back and forth while the complainant was trying to get out, and she held onto the door before eventually landing outside the truck; (4) police pursued appellant in the stolen truck for around 45 minutes before he was forced to stop; and (5) during the police pursuit, appellant's brother also tried unsuccessfully to get appellant to stop. (RRII – 179, 181, 184-85, 187-90, 202, 205, 211-12, 217-18; RRIII – 53-54, 101, 103, 113-14, 119) *See Rubac*, 611 S.W.2d at 849-50 (aggravating factors involved in the offense are relevant in determining bail).

Appellant was sentenced to 11 years in prison and the reversal of the State's case does not preclude a retrial. The court of appeals found the evidence sufficient to support the conviction but reversed on a ground of ineffective assistance of

counsel. Notably, the dissent in this case states that the majority opinion is “mired in error.” *Johnson v. State*, 606 S.W.3d 386, 409 (Tex. App.—Houston [1st Dist.] May 28, 2020, pet. granted) (Goodman, J., dissenting); *see Aviles*, 26 S.W.3d at 699 (bail determination should include the likelihood that the decision of the court of appeals will be overturned). Thus, in assessing reasonableness, this Court should defer to the bond amount that was set by the trial court.

WHEREFORE, the State respectfully requests that this Court set a bond in the amount of at least \$75,000, and impose any other conditions the Court finds necessary.

Respectfully submitted,

/s/ Patricia McLean

PATRICIA MCLEAN

Assistant District Attorney

Harris County, Texas

500 Jefferson

Houston, Texas 77002

(713) 274-5826

FAX No. (832) 927-0180

McLean_Patricia@dao.hctx.net

TBC No. 24081687

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument will be served by e-filing to:

Windi Pastorini
Attorney for Appellant
windi@pastorinilaw.com
winlaw@swbell.net

/s/ Patricia McLean
PATRICIA McLEAN
Assistant District Attorney
Harris County, Texas
500 Jefferson
Houston, Texas 77002
(713) 274-5826
FAX No. (832) 927-0180
McLean_Patricia@dao.hctx.net
TBC No.24081687

Date: November 20, 2020

Exhibit A

CAUSE NO. 153234001010

C87 D1 (COURT ORDER)

IN THE 178 DISTRICT COURT
OF HARRIS COUNTY, TEXAS

T H E S T A T E O F T E X A S

VS.

JOHNSON, JAMAILE BURNETT

AGG ROBBERY-DEADLY WPN

TO THE SHERIFF OF HARRIS COUNTY, TEXAS: GREETINGS

BY ORDER OF THE COURT ON THE 18 DAY OF OCTOBER, A.D. 2017 THE
FOLLOWING ACTION IS DIRECTED IN THE ABOVE STYLED AND NUMBERED CAUSE:

BOND SET IN THE AMOUNT OF \$75000

THE COURT HAS ORDERED THE FOLLOWING BAIL OPTIONS:

NOTES TO SHERIFF: JUDGE JOHNSON SET BOND AT \$75,000

WITNESS MY HAND AND SEAL OF OFFICE AT HOUSTON, TEXAS, THIS 18 DAY OF
OCTOBER, A.D. 2017 AT 13:44 O'CLOCK

SNU: 998
INITIATING DEPUTY:
MILLS, NAKIA
755-8310

CHRIS DANIEL, DISTRICT CLERK
HARRIS COUNTY, TEXAS

BY _____

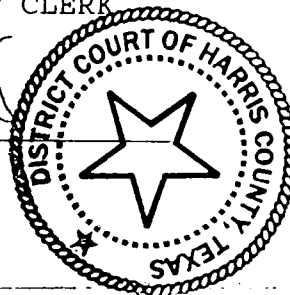


Exhibit B

Harris County Criminal District Docket Sheet

THE STATE OF TEXAS VS. JOHNSON, JAMAILE BURNETT Cause No.: 153234001010-3 Court: 178th Offense: THEFT >=2,500 <30,000 Level: State Jail Felony Charging Instrument: On Appeal CCA GENERAL ORDERS OF THE COURT	Bond: \$75,000 Next Setting: Case Disposition: Disposed Case Status: Appeal Defendant Status: JAIL
--	---

Docket Sheet Entries	
Date	Comment
11/29/2016	Felony Complaint Filed OFFENSE: AGG ROBBERY-DEADLY WPN 1st Degree Felony Bond Amount: \$0
11/29/2016	PROBABLE CAUSE FOUND
11/29/2016	COMMITMENT ISSUED—FELONY BOND AMOUNT: \$0
11/29/2016	ORDER: DEF NOT PRESENT 0700 DKT
11/29/2016	PRELIMINARY ASSIGNED COURT APPEARANCE SETTING: 11/30/2016 9:00 AM
11/30/2016	Reset By Court, 12/01/2016 09:00 AM Preliminary Assigned Court Appearance
12/1/2016	Defendant JOHNSON, JAMAILE BURNETT appeared without counsel
12/1/2016	Reset By Court, 12/05/2016 09:00 AM Preliminary Assigned Court Appearance
12/5/2016	The defendant filed a sworn pauper's oath, and JUDGE MENDOZA, DAVID JR. ordered MULDROW, ADAM DANIEL appointed as Appointed Defense Attorney
12/5/2016	MOTION FILED: FOR COMP EXAM
12/5/2016	ORDER: COMPETENCY EXAM GRANTED
12/5/2016	Reset Upon Defense Request, 2/01/2017 09:00 AM Arraignment
2/1/2017	Reset Upon Defense Request, 3/07/2017 09:00 AM Arraignment
3/3/2017	GRAND JURY ACTION: Felony Indictment GJ COURT: 262 OFFENSE: AGG ROBBERY-DEADLY WPN 1st Degree Felony BOND AMOUNT: \$0
3/3/2017	Precept issued to serve copy of indictment
3/7/2017	Reset Upon Defense Request, 4/05/2017 09:00 AM Non-Trial Setting
4/5/2017	Reset Upon Defense Request, 5/01/2017 09:00 AM Non-Trial Setting
5/1/2017	Reset Upon Defense Request, 6/06/2017 09:00 AM Non-Trial Setting
5/8/2017	MOTION FILED: TO WTHDW COUNSEL
5/24/2017	Voucher #81106 approved , Voucher Signed
5/24/2017	ORDER: ATTORNEY FEE VOUCHER FEE AMOUNT: \$726 ViPS Voucher ID: 81106 SNU: 997
6/6/2017	Defendant JOHNSON, JAMAILE BURNETT appeared with counsel SMITH, ROY WALLACE.

Harris County Criminal District Docket Sheet

6/6/2017	ORDER: TO WTHDW COUNSEL GRANTED
6/6/2017	Reset By Court, 6/19/2017 09:00 AM Non-Trial Setting
6/19/2017	The defendant filed a sworn pauper's oath, and JUDGE JOHNSON, KELLI DIANE ordered HAYNES, GEMAYEL LOCHON appointed as APPOINTED PUBLIC DEFENDER
6/19/2017	Reset Upon Defense Request, 7/17/2017 09:00 AM Non-Trial Setting
7/17/2017	Reset Upon Defense Request, 8/09/2017 09:00 AM Disposition
8/9/2017	Reset Upon Defense Request 10/18/2017 01:00 PM Disposition
8/14/2017	MOTION FILED: EX PARTE SEALED PSYC
8/14/2017	ORDER: EX PARTE SEALED PSYC GRNTD
10/18/2017	BOND SET AT \$75,000 NOTES : JUDGE JOHNSON SET BOND AT \$75,000
10/18/2017	Defendant JOHNSON, JAMAILE BURNETT appeared with counsel HAYNES, GEMAYEL L.
10/18/2017	Reset Upon Defense Request 1/08/2018 01:00 PM Pre-Trial Motions
1/8/2018	Defendant JOHNSON, JAMAILE BURNETT appeared with counsel HAYNES, GEMAYEL L.
1/8/2018	Reset Upon Defense Request, 3/07/2018 09:00 AM Pre-Trial Motions
3/7/2018	Defendant JOHNSON, JAMAILE BURNETT appeared with counsel HAYNES, GEMAYEL L.
3/7/2018	Reset By Agreement Of Both Parties 8/10/2018 09:00 AM Jury Trial
7/26/2018	MOTION FILED: ST MTN DISCL EXPERTS
7/27/2018	MOTION FILED: S/M CONSOLIDATE CASE
8/1/2018	Reset By Court 8/16/2018 09:00 AM Pre-Trial Conference
8/16/2018	Reset By Court, 8/20/2018 09:00 AM Jury Trial
8/20/2018	ORDER: COMPETENCY EXAM GRANTED
8/20/2018	ORDER: COMPETENCY EXAM GRANTED
8/20/2018	Reset By Agreement Of Both Parties, 8/22/2018 09:00 AM Jury Trial
8/22/2018	Defendant JOHNSON, JAMAILE BURNETT did not appear.
8/22/2018	Reset Upon Defense Request, 8/24/2018 09:00 AM Jury Trial
8/24/2018	Defendant JOHNSON, JAMAILE BURNETT appeared with counsel HAYNES, GEMAYEL LOCHON (@docket init 10)
8/24/2018	ORDER: REC'D COMPETENCY EVAL
8/24/2018	Reset By Court, 8/27/2018 09:00 AM Jury Trial
8/27/2018	Defendant JOHNSON, JAMAILE BURNETT appeared with counsel HAYNES, GEMAYEL LOCHON (@docket init 10)
8/27/2018	Reset By Court, 9/04/2018 09:00 AM Jury Trial
9/4/2018	MOTION FILED: FOR CONTINUANCE
9/4/2018	Reset By Court, 9/06/2018 09:00 AM Jury Trial

Harris County Criminal District Docket Sheet

9/6/2018	Reset By Court, 9/10/2018 09:00 AM Jury Trial
9/10/2018	Reset By Court, 9/11/2018 09:00 AM Jury Trial
9/11/2018	Reset By Court, 9/13/2018 09:00 AM Jury Trial
9/13/2018	<p>Defendant: JAMAILE BURNETT JOHNSON Defense Counsel: GEMAYEL HAYNES AND JACQUELINE CARPENTER Interpreter: GLENN DODSON State: LAUREN CLEMONS AND CHERYL CHAPELL Court Reporter: TAMMY L. ADAMS Judge Presiding: CAROLYN MARKS JOHNSON</p> <p>At 10:09am Court came to order for trial. A panel of 65 prospective jurors was seated, welcomed and instructed as to the law. At 10:31am State's voir dire began. At 11:04am Defense's voir dire began. At 11:40am strikes for cause & agreement were heard at the bench. At 12:36pm Counsels made their strikes. At 1:04pm a jury was impaneled, sworn and admonished, and given a lunch break. The remaining members of the panel were then excused from any further duties. At 2:09pm witnesses were sworn and the rule was invoked. At 2:12pm the Jury was seated and the defendant was duly arraigned by the reading of the Indictment in open court. The Defendant entered a plea of "NOT GUILTY" to the Indictment. At 2:15pm the State made an opening statement. At 2:16pm the Defense made an opening statement. At 2:18pm State's evidence began. At 3:26pm Court recessed for a break. At 3:47pm Jury was seated and testimony resumed. At 4:31pm the Jury was sent home for the day and instructed to return on 9/14/2018 at 9:00am.</p>
9/13/2018	Continued 9/14/2018 09:00 AM Jury Trial
9/14/2018	<p>Defendant: JAMAILE BURNETT JOHNSON Defense Counsel: GEMAYEL HAYNES AND JACQUELINE CARPENTER Interpreter: N/A State: LAUREN CLEMONS AND CHERYL CHAPELL Court Reporter: TAMMY L. ADAMS Judge Presiding: CAROLYN MARKS JOHNSON</p> <p>AT 9:27am Jury was seated and State's testimony resumed. At 9:36am the State rests. At 9:36am Court recessed for a break. At 10:14am Jury was seated and testimony for the defense began. At 10:35am Court recessed for break. At 10:48am Jury was seated and testimony resumed. At 11:14am Court recessed for a break. At 11:26am Jury was seated and testimony resumed. At 12:38pm Defense rests and the State closes. Court then recessed for a lunch break. At 1:53pm Jury was seated and the Court's charge was then read. At 2:13pm Defense made their closing arguments. At 2:24pm State made their closing arguments. At 2:33pm the Jury began their deliberations as to guilt or innocence. At 4:00pm the Jury returned with a verdict of "GUILTY" of THEFT of Property valued of \$2500.00 or more but less than \$30,000.00 as charged in the Indictment. At 4:20pm Jury was seated and the punishment phase of trial then began. The State reoffered all previous evidence and then rests. At 4:24pm Defense's evidence then began. At 4:38pm Defense rests and both sides close. At 4:40pm Jury was seated and the Court's punishment charge was then read. At 4:49pm Defense made their closing arguments. At 4:50pm State made their closing arguments. At 4:52pm Jury began their deliberations as to punishment. At 5:37pm Jury was seated and returned a verdict of 11 years TDCJID. The Jury was then released from any further duties. The Court sentenced the defendant to 11 Years TDCJID.</p> <p>Court recessed for a break.</p>
9/14/2018	ORDER: JURY PUNISHMENT

Harris County Criminal District Docket Sheet

9/18/2018	ORDER: PREP STMT FACT APPEAL GRNTD
9/18/2018	Delivery Order Issued Location: Texas Department of Criminal Justice awaiting mandate
9/18/2018	Notice of Appeal Filed
9/20/2018	The defendant filed a sworn pauper's oath, and JUDGE JOHNSON, KELLI DIANE ordered AKINS, WINDI appointed as Appointed Atty On Appeal
9/20/2018	The defendant filed a sworn pauper's oath, and JUDGE JOHNSON, KELLI DIANE ordered GRIGSBY, JAMES ANDRE appointed as Appointed Atty On Appeal
9/26/2018	Assigned to 1st Court of Appeals
10/12/2018	Assign Court of Appeals Case Number: 01-18-00897-CR

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Patricia McLean
Bar No. 24081687
McLean_Patricia@dao.hctx.net
Envelope ID: 48302194
Status as of 11/23/2020 9:48 AM CST

Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule	24031632	information@spa.texas.gov	11/20/2020 2:56:35 PM	SENT

Associated Case Party: Jamaile Johnson

Name	BarNumber	Email	TimestampSubmitted	Status
Windi Pastorini		winlaw@swbell.net	11/20/2020 2:56:35 PM	SENT
Winifred Pastorini	962500	Windi@pastorinilaw.com	11/20/2020 2:56:35 PM	SENT